

# **A Practical Guide to Electronic Discovery Under the New Federal Rules**

**Arkansas State Bar Annual Meeting  
June 8, 2007**

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**Note:** An electronic copy of this outline is at [http://www.utd.uscourts.gov/judges/nuffer\\_resources.htm#Continuing](http://www.utd.uscourts.gov/judges/nuffer_resources.htm#Continuing).  
That version includes working hyperlinks.

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## Pre-Litigation

Review your client's retention policy:<sup>1</sup>

Does it consider these essential factors?

Regulatory Compliance

Business Goals: Disaster Recovery, Space Economy, Management  
Information, Information Security, Customer Information

Litigation Duties

Does it have a robust "Litigation Hold" feature?

Ability to suspend and modify retention policy in event of litigation

Does the policy include effective procedures?

Valid design

Dissemination and availability

Communication during operations

Training

Compliance audits and evaluation

Revision

Are your client's management and IT teams competent?

Capabilities

Knowledge

Strategies and risks

Retention obligations

Procedures of electronic discovery

Potential grounds for and scope of sanctions

Behavior

Are you and your consultant(s) competent?

Can you speak tech or do you have a staff member/consultant who will assist you?

Can your preservation and data analysis consultants speak to lawyers, judges and jurors?

Are you paying attention?

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<sup>1</sup> For a basic introduction, see [John P. Hutchins, Esq., Document Retention Basics, 865 PLI/Pat 785, PLI Order No. 8966 June-July, 2006.](#)

## Planning in Litigation

Meet with client IT staff and management

Preservation – Litigation Hold

Ensure it exists and is adequate, clearly understood, communicated, implemented, and monitored.

Understand and inventory systems.<sup>2</sup> Prepare for meeting with opposing counsel and potential 30(b)(6) depositions – defensive and offensive.

Meet with opposing counsel (Rule 16) – and IT staff

[T]he parties must, as soon as practicable . . . confer . . . to discuss any issues relating to preserving discoverable information, and . . .

- (3) any issues relating to **disclosure or discovery of electronically stored information**, including the **form or forms** in which it should be produced;
- (4) any issues relating to claims of **privilege** or of protection as trial-preparation material, including -- if the parties agree on a procedure to assert such claims after production -- whether to ask the court to include their agreement in an order . . . .<sup>3</sup>

Discuss deleted data, archival data, inaccessible data, on-going operations.

Preservation letter? – a two-edged sword

Court conference (Rule 26)

The scheduling order also may include

- (5) provisions for **disclosure or discovery of electronically stored information**;
- (6) any agreements the parties reach for asserting claims of **privilege** or of protection as trial-preparation material after production . . . .<sup>4</sup>

Preservation orders and other extraordinary preliminary relief are met with widely varying receptions depending on the judge.

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<sup>2</sup> David K. Isom, Electronic Discovery Source Checklist for Plaintiffs and Defendants, ABA Commercial and Business Litigation Journal 6 (Spring 2004). Available at [http://www.utahbar.org/cle/springconvention/materials/ediscovery\\_checklist.pdf](http://www.utahbar.org/cle/springconvention/materials/ediscovery_checklist.pdf)

<sup>3</sup> Fed. R. Civ. P. 26(f).

<sup>4</sup> Fed. R. Civ. P. 16(b).

## Disclosure

[A] party must, without awaiting a discovery request, provide to the other parties . . . a copy of, or a description by category and location of, all . . . **electronically stored information** . . . that the party may use to support its claims or defenses, unless solely for impeachment.<sup>5</sup>

## Discovery

Electronic information is now expressly within the discovery rules.

### Rule 33 – Interrogatories

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records, **including electronically stored information**, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.<sup>6</sup>

### Rule 34 – Production

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or **sample**<sup>7</sup> any designated documents or **electronically stored information**.<sup>8</sup>

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<sup>5</sup> [Fed. R. Civ. P. 26\(a\)\(1\)](#).

<sup>6</sup> [Fed. R. Civ. P. 33\(d\)](#).

<sup>7</sup> “The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party’s electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.” Committee Note, 2006 [Amendment to Fed. R. Civ. P. 34\(a\)](#).

<sup>8</sup> [Fed. R. Civ. P. 34\(a\)](#).

## Scope of Discovery

### Rule 26(b)(2)(B) – (two tiers)

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as **not reasonably accessible** because of undue burden or cost. On motion to compel discovery or for a protective order, the **party from whom discovery is sought must show** that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.<sup>9</sup>

You must still *disclose* these sources if you may use them. In discovery responses, you must *identify* the sources. It would be wise to state why they are not reasonably accessible and provide factual support.

The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.<sup>10</sup>

### Rule 26(b)(2)(B) – Reasonableness limitations that govern all discovery:

(C) The **frequency or extent of use of the discovery methods** otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is **unreasonably cumulative or duplicative**, or is obtainable from some other source that is more **convenient**, less **burdensome**, or less **expensive**; (ii) the party seeking discovery has had **ample opportunity** by discovery in the action to obtain the information sought; or (iii) the **burden** or expense of the proposed discovery **outweighs** its likely **benefit**, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).<sup>11</sup>

<sup>9</sup> [Fed. R. Civ. P. 26\(b\)\(2\)\(B\)](#).

<sup>10</sup> Committee Note, 2006 [Amendment to Fed. R. Civ. P. 26](#).

<sup>11</sup> [Fed. R. Civ. P. 26\(b\)\(2\)\(C\)](#).

Argue the fact-sensitive elements of your case.

## Form of Production

### Rule 34(b) - -- Point / Counterpoint

The request may specify the form or **forms** in which electronically stored information is to be produced.<sup>12</sup>

[A]n **objection** to the requested form or forms for producing electronically stored information [shall state] the reasons for the objection. . . . If **objection** is made **to the requested form or forms** for producing electronically stored information -- **or if no form was specified** in the request -- **the responding party must state the form or forms** it intends to use.<sup>13</sup>

Unless the parties otherwise agree, or the court otherwise orders:  
(ii) if a request does not specify the form or forms for producing electronically stored information, **a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable**; and  
(iii) **a party need not produce the same electronically stored information in more than one form**<sup>14</sup>

## What is Metadata and Does it Matter?

assessors.<sup>6</sup> The French collaborative court model, *cour d' assises*, is a variation. During deliberation, the three professional judges collaborate with the nine *jurés*, but then the jury votes secretly.<sup>8</sup> Several European countries have adopted some variation or combination of the French and/or German systems.<sup>9</sup> Mixed tribunals are also seen outside of Europe in such countries as China.<sup>10</sup> Most countries that use mixed adjudicating tribunals attempt to give the lay judges the same rights and access to information as professional judges.<sup>11</sup> In almost all countries with a mixed tribunal, no matter how much the system attempts to equalize the lay and professional judges, there are reports that professional judges exert too much influence.<sup>12</sup>

**Comment [A1]:** Need something on this model. Jackson and Kovalev -- Lay adjudication and human right in Europe

**Deleted:** mix between the European continental jury and the Schöffens Courts.

**Deleted:** Variations of mixed

**Deleted:** some variation of the

**Deleted:** must















[Marjorie A. Shields, J.D. Discoverability of Metadata, 2006 A.L.R. 6th 6 \(2006\)](#)

<sup>12</sup> [Fed. R. Civ. P. 34\(b\)](#).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

## What form do you want?

	Native	PDF Text	PDF Image	TIFF	Paper
Metadata		Negotiate			
Need special software?					
E-Search					
Bates stamped					
Identified to original file/author	Negotiate!				
As kept in ordinary course					
Identified to requests					
Familiar	Develop expertise				

## Privilege

**(B) Information Produced.** If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.<sup>15</sup>

The volumes of information produced in electronic discovery may make privilege review prior to production difficult. While traditional production would contemplate privilege review by the producing party before production is made, alternative methods include:

- a. production of massive unreviewed data, after which the responding party reviews for responsiveness, after which the producing party reviews the identified subset for privilege;
- b. designation of a third party who will review for privilege and responsiveness; and/or;
- c. agreement on application of search terms to electronic data to determine potential responsiveness to reduce the overall volume of material.

When the [privilege] review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. . . . **Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced** in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution. Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production.<sup>16</sup>

**[Proposed amendment of FRE] 502<sup>17</sup>** (Attorney-Client Privilege and Work Product; Limitations on Waiver) is intended to **reduce the risk of forfeiting** the attorney-client **privilege** or work-product protection so that **parties need not scrutinize production of documents** to the same extent as they now do. Under

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<sup>15</sup> [Fed. R. Civ. P. 26\(b\)\(5\)\(B\).](#)

<sup>16</sup> [Comment to 2006 Amendments to Fed. R. Civ. P. 26\(b\)\(5\)\(B\).](#)

<sup>17</sup> [Proposed FRE 502](#) is found at [http://www.uscourts.gov/rules/Excerpt\\_EV\\_Report\\_Pub.pdf](http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf) with more information on <http://www.uscourts.gov/rules/newrules1.html>. Updates on the rule may be found at <http://www.ediscoverylaw.com/articles/federal-rules-amendments/>.

the new rule, the **inadvertent disclosure** of privileged or protected information would **not effect a waiver if reasonable steps were taken** to prevent the disclosure, **and retrieval** of the information is **promptly demanded**. Also, the **disclosure** of privileged or protected information **would not waive** the privilege or protection accorded other information concerning the same **subject matter**, unless fairness so requires. Furthermore, **a confidentiality order entered by the court would bind all nonparties in any federal or state court**. The [proposal includes] a possible provision governing **selective waiver**, which would prevent a general waiver of the privilege or protection for information disclosed to a law enforcement or regulatory agency in the course of an investigation.<sup>18</sup>

The court considers the following five factors in its determination of whether an inadvertent disclosure of documents effects a waiver of the attorney-client privilege: 1) the reasonableness of the precautions taken to prevent inadvertent disclosure; 2) the time taken to rectify the error; 3) the scope of discovery; 4) the extent of disclosure; and 5) the overriding issue of fairness.<sup>19</sup>

## Sanctions

[Fed. R. Civ. P. 37\(d\)](#) and (b)(2)

If a party or [related person fails to appear for deposition, answer interrogatories, or respond to a request for inspection] . . . the court in which the action is pending on motion may make **such orders** in regard to the failure **as are just**, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule.<sup>20</sup>

(2) Sanctions by Court in Which Action Is Pending. If a party or [related person fails to obey an order for discovery], the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:  
(A) An order that the matters regarding which the order was made or any other designated **facts shall be taken to be established** for the purposes of the action in accordance with the claim of the party obtaining the order;  
(B) An order **refusing** to allow the disobedient party to support or oppose designated **claims or defenses**, or **prohibiting** that party from introducing designated matters in **evidence**;  
(C) An order **striking out pleadings** or parts thereof, or **staying** further **proceedings** until the order is obeyed, or **dismissing** the action or proceeding or any part thereof, or **rendering a judgment** by default against the disobedient party . . . .<sup>21</sup>

<sup>18</sup> [Brochure Summarizing Proposed Amendments to the Federal Rules \(August 2006\)](#).

<sup>19</sup> [Wallace v. Beech Aircraft Corp.](#) 179 F.R.D. 313, 314 (D.Kan.,1998) [Ken M. Zeidner](#) , [Note Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the Work-Product Doctrine for Guidance](#), 22 *Cardozo L. Rev.* 1315 ( 2001).

<sup>20</sup> [Fed. R. Civ. P. 37\(d\)](#).

<sup>21</sup> [Fed. R. Civ. P. 37\(b\)\(2\)](#).

### Inherent judicial authority

It has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others. . . . These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.<sup>22</sup>

### Statutory authority

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.<sup>23</sup>

### Rule 37(f) “Safe Harbor”

**(f) Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information **lost as a result of the routine, good-faith operation** of an electronic information system.<sup>24</sup>

### Subpoenas

Note that Rule 45 incorporates e-discovery concepts.

### Perspective

Don't let the electronic discovery or sanctions sideshow obscure the merits.

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<sup>22</sup> [\*Chambers v. NASCO, Inc.\*, 501 U.S. 32, 43 \(U.S. 1991\).](#)

<sup>23</sup> [28 U.S.C.A. § 1927](#)

<sup>24</sup> *Id.*

## Resources

Federal Judicial Center Materials on Electronic Discovery

<http://www.fjc.gov/public/home.nsf/pages/196>

American Bar Association Legal Technology Center E-Discovery Resource List

<http://www.abanet.org/tech/ltrc/fyidocs/ediscovery.html> (lists many sources, including books with helpful forms)

The Sedona Conference [www.sedonaconference.org](http://www.sedonaconference.org)

[Electronic Document Retention and Production](#)

E-discovery Amendments and Notes

[http://www.uscourts.gov/rules/EDiscovery\\_w\\_Notes.pdf](http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf)

found at <http://www.uscourts.gov/rules/congress0406.html>

Ken Withers' Site [www.kenwithers.com](http://www.kenwithers.com)

Electronic Discovery and Evidence Blog by Michael Arkfeld <http://arkfeld.blogs.com/>

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